STATE OF MICHIGAN

COURT OF APPEALS

SHIRLEY AUGUSTINE, Plaintiff-Appellee,	UNPUBLISHED August 21, 2008
v	No. 276537 Oakland Circuit Court
ALLSTATE INSURANCE COMPANY, Defendant-Appellant.	LC No. 2004-056897-NF

Before: Murray, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right the final judgment in this first-party, no-fault action. Defendant challenges the trial court's award of attorney fees. In light of *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), we vacate the award and remand for further proceedings.

Plaintiff was seriously injured in an auto accident and sought first-party, no-fault benefits from her insurer, defendant, to pay for the permanent attendant care that she now requires. Defendant paid the benefits for two years but ceased payments over a dispute regarding plaintiff's refusal to provide more detailed documentation of the nature of her care. Plaintiff brought the instant suit and was victorious, recovering $371,700 of the $929,000 that she sought, plus interest in the amount of $42,524. Plaintiff subsequently sought attorney fees pursuant to MCL 500.3148(1) due to defendant's "unreasonable delay" in making benefit payments. The trial court awarded attorney fees in the amount of $312,625 based upon a finding that plaintiff's attorneys had done 543.75 hours of work at $500 per hour and 51.25 hours at $300 per hour. The trial court's ruling was as follows:

> The court has considered the criteria set forth in *Crawley v Sohick*, 48 MA 728 and *Wood v DAIIE*, 413 Mich 573, and makes a finding that the professional services of attorney Arthur Y. Liss and Nicholas Andrews should be compensated at the rate of $500.00 per hour. In attempting to apply the same criteria to attorneys Karen Seder and Jay Schrier, this Court finds that it has no first hand knowledge concerning the professional standing and experience, the difficulty of any case in which they have participated. Therefore, as to any professional fees claimed in the instant case, the Court will allow the average of a senior associate in Southeastern Michigan which amount is $300.00 per hour.
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> With regard to the actual amount of attorney fees allowed, this Court has carefully reviewed the bill of cost submitted. Based upon this Court's findings with regard to the expertise, experience, skill, time and labor involved as to Mr. Liss and Mr. Andrews, it is inconceivable that conferences with regard to the instant case between all four members of the firm should be necessary and be billed at $2,000.00 per hour. Furthermore, this leads to an inference that in these conferences, other cases could be discussed, resulting in billings approaching $8000.00 to $10,000.00 per hour depending on the number of cases discussed in a one hour conference. This would be unconscionable. Therefore, this Court will allow one attorney fee of $500.00 per hour for said conferences. In further analyzing the bill of costs, it would seem that some of the claimed hours would be duplicative in nature. However, it would be most difficult to determine who did what, when it was done, and how long it took, and, therefore, no further reduction in hours shall be claimed.
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> For all of the reasons previously stated, and with regard to the remaining claim for attorney fees, the Court will allow 543.75 hours at $500.00 per hour and 51.25 hours at $300.00 per hour for a total of $287,250.00.

Defendant first argues that the trial court erred in its factual findings regarding the billing time and rates for plaintiff's attorneys. A trial court's decision regarding attorney fees is generally reviewed for an abuse of discretion. *In re Temple*, 278 Mich App 122, 128; 748 NW2d 265 (2008); *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005). Underlying findings of fact, however, are reviewed for clear error. *Temple*, *supra* at 128.

As the quote above reflects, the trial court, citing among other cases *Wood v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982), awarded the attorney fees by approving a $500 hourly rate for two of plaintiff's attorneys (multiplied by 543.75 hours) and $300 per hour for two others (multiplied by 51.25 hours). The trial court, however, did not articulate how it arrived at the $500 per hour figure (other than it "considered" the *Wood* criteria), but it did indicate the $300 per hour was awarded based on "the average of a senior associate in Southeastern Michigan . . ." The trial court then reduced some of the hours expended in conferences, and despite recognizing duplicative billings, failed to further reduce the hours because "it would be most difficult to determine who did what, when it was done, and how long it took . . ." The court did not further discuss any of the *Wood* factors.

After the briefs were filed in this case, the Supreme Court decided *Smith v Khouri*, *supra*. In that case, the Court held that when considering a request for attorney fees, a trial court must apply both the *Wood* factors and those set forth in Michigan Rule of Professional Conduct 1.5(a). *Smith*, *supra* at 522. However, the first step for the trial court is "the process of calculating a reasonable attorney fee by determining factor 3 under MRPC 1.5(a), i.e., the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence. This number should be multiplied by the reasonable number of hours expended." *Id*. Once this number is established, the court may make upward or downward adjustments in light of the *Wood* and MRPC 1.5(a) factors, with at least a brief articulation of its views on each factor. *Id*.

In light of the procedure set out by the *Smith* Court, which the trial court naturally did not follow, we must vacate the award of attorney fees and remand to the trial court to apply the procedure outlined in *Smith*. Although the trial court did first arrive at the hourly rate, as to the $500 rate the court did not follow the *Smith* analysis because it did not first look to what was customarily charged in the locality for similar work. And, although it indicated that the $300 figure was based upon the average in southeastern Michigan for senior associates, the court did not indicate what evidence (survey, reports, etc.) it relied upon in arriving at this figure.

Finally, we note that in determining the hourly rate, the focus is on initially finding a reasonable fee, i.e., the "fee customarily charged in the locality for similar legal service." *Smith, supra* at 530.. That reasonable fee figure can be different than the fee paid to a premiere attorney. *Id*. However, if warranted, the court can increase that rate based upon the relevant factors under *Wood* and MRPC 1.5(a). *Id*. Finally, the trial court should take care in not relying upon previous awards to these attorneys without first determining whether those other awards were for work on cases similar to this one. *Id*. at 530-531.

We vacate the trial court's award of attorney fees and remand for the trial court to make specific findings, consistent with *Smith*, on each attorney whose fees plaintiff sought to recover in this case. *Id*. at 531.[1] We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Talbot

[1] The trial court should also either hold an evidentiary hearing to allow it to make proper findings of fact, or articulate on the record or in writing why such a hearing was not necessary.